

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH L. KAYE,

Defendant-Appellant.

UNPUBLISHED

September 15, 2000

No. 212093

Wayne Circuit Court

Criminal Division

LC No. 97-500440

Before: Gribbs, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial conviction for felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to six months of weekend jail time and five years' probation. We affirm.

Defendant first argues that the lower court failed to advise him of the risks of self-representation. Defendant claims that the record is silent regarding whether defendant unequivocally requested to represent himself. We disagree. A claim that the trial court failed to comply with the requirements of MCR 6.005(D) implicates constitutional rights. *People v Dennany*, 445 Mich 412, 426-427, 437 (Griffin, J.), 449 (Cavanagh C.J., concurring in part and dissenting in part); 519 NW2d 128 (1994). Constitutional issues are reviewed de novo. *People v Levandoski*, 237 Mich App 612, 619; 603 NW2d 831 (1999).

There is a presumption against the waiver of the right to counsel. *People v Adkins (After Remand)*, 452 Mich 702, 720-721; 551 NW2d 108 (1996). MCR 6.005(D), the court rule governing the initial waiver of a defendant's right to counsel, requires:

First, the court may not permit the defendant to waive the right to be represented by a lawyer without advising the defendant of (a) the charge, (b) the maximum possible prison sentence for the offense, (c) any mandatory minimum sentence required by law, and (d) the risk involved in self-representation.

Second, a defendant who wishes to proceed pro se must be offered the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer. [*Dennany, supra* at 438, discussing MCR 6.005(D).]

In addition to the court rule, the trial court must comply with the requirements set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976). *Adkins, supra* at 722. Pursuant to *Anderson*, the trial court must determine that (1) the defendant's request to proceed in propria persona is unequivocal, (2) the defendant knowingly, intelligently, and voluntarily asserted the right to proceed in propria persona, which is ascertained by advising the defendant of the dangers of self-representation, (3) and the defendant's self-representation will not result in disruption, undue inconvenience, or burden to the trial court. *Dennany, supra* at 439. The trial court must inform the defendant of the substance of MCR 6.005(D) and the *Anderson* requirements, "and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Adkins, supra* at 726-727.

"The trial judge is in the best position to determine whether the defendant has made the waiver knowingly and voluntarily." *Adkins, supra* at 723. The trial court can determine the method of complying with the requirements of MCR 6.005 and *Anderson*, provided that the trial court discusses the substance of both, and an express finding is placed on the record that the defendant fully understands and agrees to abide by the procedures for waiving trial counsel. *Adkins, supra* at 725-727. If the trial court's error did not completely omit the court rule and *Anderson* requirements, whether reversal is required depends on the nature of the error. *Dennany, supra* at 439.

We conclude that the lower court erred by not complying with the requirements of the court rule. During a pretrial motion, defendant expressed his desire to waive the right to trial counsel. The lower court advised defendant that he was charged with felonious assault, which was punishable by up to four years' imprisonment, and appointed an attorney to provide defendant with advice. At the time of defendant's initial waiver, the lower court did not advise defendant of the risks involved in self-representation, as is required by MCR 6.005(D). Further, the lower court erred by not complying with the requirements of *Anderson*. The record does not indicate that the lower court advised defendant of the dangers of self-representation, which is necessary for the lower court to determine that defendant knowingly, intelligently, and voluntarily asserted the right to proceed in propria persona.

Although the lower court erred, reversal is not required in this case. Because defendant failed to object at trial, the claim of error is unpreserved and reviewed under the plain error rule. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763. To establish that the plain error affected substantial rights, the defendant must show that "the error affected the outcome of the lower court proceedings." *Id.* If the defendant meets these requirements, this Court should reverse only when the error resulted in the conviction of an actually innocent defendant or the fairness, integrity, or public reputation of the proceedings was seriously affected. *Id.* at 763-764.

Even assuming that the three requirements of the plain error rule are satisfied, we conclude that defendant's conviction should not be reversed. The error did not result in the conviction of an "actually innocent defendant." *Id.* at 763. Defendant was convicted of felonious assault, MCL 750.82; MSA 28.277. The elements of this crime are an assault, with a dangerous weapon, and with the intent to injure or place the victim in reasonable fear or apprehension of an immediate battery. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). These elements were established through the testimony. Patterson testified that he was scared when defendant was pointing the gun at him. Defendant testified that he had a BB gun in his hand when he went outside. Defendant also testified that his intent was to get the repossession people to leave and to protect his son and his property.

Nor was the fairness, integrity, or public reputation of the proceedings seriously affected by the error. Because the effectiveness of a waiver is dependent upon what a defendant understands, evidence of other facts may favor a finding that a defendant knowingly and intelligently waived the right to trial counsel. *Adkins, supra* at 723-724. The record reflects that defendant unequivocally requested to proceed in propria persona, and that adequate assurances were given that defendant's right to proceed in propria persona was knowingly, intelligently, and voluntarily asserted.

Before trial, defendant expressed his desire to proceed in propria persona numerous times. Defendant first stated that he wished to waive his right to appointed counsel during a pretrial hearing on April 25, 1997. On May 15, 1997, defendant waived the right to have appointed counsel argue his motion, and argued the motion himself. Defendant proceeded in propria persona during two subsequent hearings on pretrial motions. During the final conference, the trial court stated, and defendant agreed, that he been advised of the risks. Defendant then affirmed his desire to continue to represent himself.

During trial, defendant also made statements that indicated that he wanted to proceed in propria persona and had knowingly waived his right to counsel. Further, defendant filed numerous pretrial motions that were supported by briefs, which he argued before the court. Defendant filed and argued a motion to dismiss appointed counsel, obtain the transcript from a previous proceeding, and request additional time to prepare. Defendant also filed a motion compelling the disclosure of exculpatory information. Defendant argued this motion before the lower court on May 15, 1997, after waiving the right to have appointed counsel argue the motion. Defendant filed and argued another motion to show cause, compel discovery, extend the trial date, recuse the judge, and dismiss the amended information. Defendant also filed additional pretrial motions that were not argued, including one requesting a writ of mandamus for the recusal of a judge.

These actions support a finding that defendant knowingly, intelligently, and voluntarily waived his right to trial counsel. The record is devoid of any indication that defendant changed his mind regarding his decision to proceed in propria persona. Defendant effectively relinquished his right to counsel, and the fairness, integrity, or public reputation of the proceedings were not seriously affected by the error. Therefore, defendant's conviction should not be reversed.

Defendant also argues that reversal is required because the trial court failed to adequately advise him of his continued right to the assistance of counsel pursuant to MCR 6.005(E). We disagree. The construction of court rules is a question of law that is reviewed de novo. *Levandowski, supra* at 617.

A claim that the trial court failed to comply with the requirements of MCR 6.005(E) is treated like any other trial error. *People v Lane*, 453 Mich 132, 140; 551 NW2d 382 (1996). In order to be properly preserved for appellate review, an issue must have been raised and addressed by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Defendant did not challenge the trial court's failure to advise him of his continuing right to counsel during the proceedings following his initial waiver of the right to trial counsel. Therefore, defendant must establish the existence of compelling or extraordinary circumstances. *Grant, supra*. Given defendant's numerous expressions of his desire to represent himself, it seems highly unlikely that defendant would have changed his mind. Therefore, the failure to adequately advise defendant of his continuing right to counsel does not give rise to compelling or extraordinary circumstances. This issue is not properly before this Court.

In any event, we conclude that defendant's conviction should not be reversed. Although the record does not show that defendant was advised in subsequent proceedings of his continuing right to the assistance of counsel, the error did not result in the conviction of an innocent defendant, nor was the fairness, integrity, or public reputation of the proceedings seriously affected by the error. *Carines, supra*. The record reflects that defendant unequivocally requested to proceed in propria persona, and that adequate assurances were given that defendant's right to proceed in propria persona was knowingly, intelligently, and voluntarily asserted. Therefore, the lower court's failure to adhere to the court rule does not require reversal.

Defendant's next argument is that he should have been permitted to argue self-defense. We disagree. The trial court has discretion to determine what constitutes a fair and proper opening statement. *People v Buck*, 197 Mich App 404, 413; 496 NW2d 321 (1992), rev'd in part on other grounds sub nom *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993). This Court will not reverse matters within the discretion of the trial court unless the trial court has abused its discretion. *People v Teske*, 147 Mich App 105, 109; 383 NW2d 139 (1985). An abuse of discretion occurs when there is no justification for the trial court's ruling in light of the facts presented. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The trial court did not abuse its discretion when it refused to allow defendant to argue self-defense. Self-defense requires a showing that the defendant honestly and reasonably believed that his life was in imminent danger or that there was a threat of serious bodily harm. *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). The evidence presented at trial does not support a finding that defendant believed that his life was in danger or that there was a threat of serious bodily harm. Defendant testified that one of the first things he noticed when he arrived outside was that the two men could not get out of the truck because the driveway is narrow and there was not enough room for them to open the doors of the truck. Defendant also testified that he breathed a sigh of relief when he realized that the two men could not exit the vehicle. Defendant denied that he pointed the BB gun at the two men, and stated that such an action was pointless because the men could not get out of the truck. In light of this evidence, there was justification for the trial court's ruling. Therefore, the trial court did not abuse its discretion when it refused to allow defendant to argue self-defense.

Defendant also argues that his mistaken belief regarding his legal rights to protect his property negated the specific intent element of felonious assault, and that he should have been permitted to make that argument. The claim that the trial court prevented defendant from arguing mistake of the law is not supported by the transcript. Defendant did not argue at any time that his belief regarding his legal rights to protect his property was mistaken. Therefore, defendant's argument that the trial court prevented him from arguing mistake of law is without merit.

Defendant's final argument is that the trial court erred when it failed to provide an instruction that the lower court stated would be given. Jury instructions are reviewed in their entirety. *People v Mass*, 238 Mich App 333, 339; 605 NW2d 322 (1999). The inquiry is whether error requiring reversal exists. *Id.* "Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights." *Id.*

Appellate review of a claim of error from the failure to provide a jury instruction requires that the party requested the instruction at trial or a showing that a miscarriage of justice would result from failure to consider the issue. *People v Messenger*, 221 Mich App 171, 177; 561 NW2d 463 (1997). Defendant did not request that the trial court instruct the jury that the missing tapes were to be considered exculpatory evidence. This issue is not properly before this Court because defendant cannot establish that a miscarriage of justice would result if this Court failed to consider the issue.

Defendant testified during trial that he called the Westland Police Department after receiving a phone call. During his telephone conversation with the police, defendant told the police that he had heard that they wanted him. Defendant testified that he told the police that he did not have a weapon and that he did not want the SWAT team coming to his house.

We conclude that an instruction that the contents of the tapes were to be considered exculpatory would not have affected the outcome of defendant's trial. Defendant was convicted of felonious assault, MCL 750.82; MSA 28.277. As stated above, the elements of this crime were established through the testimony. Even if the jury had been instructed to consider the evidence on the police tapes as favorable to defendant, the contents of the conversation did not negate any of the elements of felonious assault.

In addition, defendant cannot establish any of the three requirements of the plain error rule. *Carines*, *supra* at 763. The trial court is not required to provide a jury instruction unless the defendant makes a request for the instruction. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, modified 450 Mich 1212 (1995). Defendant did not request the instruction regarding the police tapes. Therefore, the trial court did not err in failing to provide the instruction that the jury was to consider the police tapes favorable to defendant. For these same reasons, if an error had occurred, it would not have been clear or obvious. Further, as stated above, the failure to provide the instruction would not have affected the outcome of the trial. Defendant's claim of instructional error is, therefore, forfeited under the plain error rule.

We affirm.

/s/ Roman S. Gibbs
/s/ Jane E. Markey